

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

<b>UNITED STATES OF AMERICA</b>	*	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	*	<b>NUMBER: 12-1924</b>
<b>v.</b>	*	<b>SECTION: E</b>
<b>THE CITY OF NEW ORLEANS</b>	*	
<b>Defendant</b>	*	
	* * *	

**UNITED STATES’ MEMORANDUM IN RESPONSE  
TO MOTIONS TO INTERVENE**

**I. INTRODUCTION**

On July 24, 2012, the United States filed a Complaint alleging a pattern or practice of misconduct by the New Orleans Police Department. At the same time, the United States and the City of New Orleans (“City”) (collectively, “the Parties”), filed a Joint Motion and a proposed Consent Decree [ECF No. 2-1] (“Decree”), an agreement between the United States and the City intended to resolve the United States’ claims against the City and remedy the unconstitutional conduct the United States found. Four organizations have moved separately to intervene in this matter, including two of the three New Orleans Police Department (“NOPD”) police associations; the Office of the Independent Police Monitor (“OIPM”), and a single community-based organization, Community United For Change (collectively, “Movants”). This memorandum responds to all four Motions for Intervention.

The United States' investigation of NOPD, which began on May 15, 2010, and culminated in a Report of Findings ("Report") issued on March 16, 2011, included an unprecedented level of interaction with community groups, criminal justice stakeholders, and NOPD officers and their associations. On the day of and day after the announcement of the investigation, the Assistant Attorney General for the Civil Rights Division and other U.S. Department of Justice representatives met with police association representatives and community groups to hear their concerns and gather their suggestions. This interaction with community members and officers continued throughout the investigation and included scores, if not hundreds, of in-person group and individual meetings, conversations, and officer "ride alongs."

Subsequent to the issuance of the United States' Report of Findings, the Parties spent months negotiating to reach a groundbreaking settlement that endeavors to balance the myriad interests of all members of the New Orleans Community, while reforming NOPD to ensure constitutional policing. Throughout this time, the United States continued to meet with all interested stakeholders to illicit their continuing concerns and their ideas about how to remedy the problems from their perspectives. These stakeholders included the current organizational Movants and their members. Recognizing the central importance of independent civilian oversight to effective police reform, the United States conferred closely with the OIPM throughout the negotiation process as well. Importantly, the United States interacted with a large number of interested stakeholders beyond those who move to intervene now.

The United States anticipates and looks forward to the continuation of broad community, officer, and other stakeholder input throughout the time the Decree is being implemented. The Decree itself incorporates numerous mechanisms intended to ensure robust interaction between NOPD, community members, the Consent Decree Monitor, and the OIPM. Additionally, the

Court is providing the first formal, public opportunity for broad comment on the fairness, adequacy, and reasonableness of the Consent Decree, in less than two weeks, on August 29. The Court's Order of July 31 permits "*any* person wishing to comment upon the proposed Consent Decree," (emphasis added) to do so by filing a written submission of up to twenty pages. Order, July 31, 2012 [ECF No. 7-1] (emphasis added).

In the view of the United States, it is appropriate that *any* person be permitted to provide comment regarding the Decree before it is entered, as the Court has ordered. In the same vein, it is important that a broad and diverse spectrum of opinions, insights and perspectives continues to engage in this process throughout implementation of the Decree to ensure that all concerns are heard and considered. Different groups and individuals may have different interests that ebb and flow throughout implementation of the Decree and each should be permitted to ensure those interests are heard as need be. It would undercut such broad and meaningful stakeholder input to give special status to only a few groups, particularly as this may compromise the shared interest of bringing about the swift, effective, and lasting reform of NOPD. Rather, the United States proposes that the Court ensure that community, officer, and other interested stakeholder voices are heard and considered by granting *amicus* status as appropriate. This will allow interested non-parties to express their concerns to the Court and the Parties, and ensure they are considered as needed throughout the term of the Decree and without unnecessarily delaying implementation.

This approach is appropriate and preferable where, as here, none of the Movants has any legal interest that may be impaired by the Decree, and thus no claim to intervention as of right. As such, there is no limiting principle for restricting intervention to these four Movants, and no clear argument justifying the elevation of their interests over the interests of the hundreds of thousands of others whose interests are impacted by the Decree.

Movants believe that because they were not directly involved in negotiations, the Decree does not adequately address their interests. As discussed herein, the United States engaged in monumental efforts to ensure that all interests were considered, while at the same time attempting to appropriately balance myriad interests in negotiating the Decree. While each Movant will be affected by the resolution of this matter, so will the entire City of New Orleans including those who live in, work in and visit the City. None of the four Movants articulates any legitimate specific interest that may be harmed by the implementation of the Decree.

For these reasons, and as discussed further below, the United States proposes that the Movants be granted *amicus* status so that they can personally address the Court for the purposes of the August 29 hearing, and further, as this Court deems fit.

## **II. BACKGROUND**

On May 15, 2010, the United States initiated an investigation of the New Orleans Police Department pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (“Section 14141”), the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d, and Title VI of the Civil Rights Act of 1964 42 U.S.C. §§ 2000d to 2000d-7, and its implementing regulations, 28 C.F.R. §§ 42.101-.112.

This investigation was one of the most extensive investigations of a law enforcement agency ever conducted by the U.S. Department of Justice’s Civil Rights Division, and included more officer and community interaction than in any prior law enforcement investigation by the Division. The investigation included many interviews and meetings with NOPD officers, supervisors and command staff, as well as members of the public, City and State officials, and other community stakeholders. It also included on- and off-site review of documents, including policies and procedures, training materials, incident reports, use of force reports, crime

investigation files, data collected by NOPD, complaints of misconduct, and misconduct investigations. The United States also participated in ride-alongs with officers and supervisors, attended COMSTAT meetings, observed police activity, and met with representatives of police fraternal organizations and several larger group officer “round tables” to elicit officer concerns and ideas about how to improve services provided by NOPD. The United States also participated in over 40 community meetings, including meetings held at the United States’ request as well as regularly scheduled community meetings. The United States also met with judges from the state and municipal courts and members of the Orleans Parish District Attorney’s Office, the Orleans Public Defender’s Office, the Civil Service Commission, the Office of the Independent Police Monitor, City Council, Louisiana State Legislators, the Business Council of New Orleans & the River Region, the New Orleans Police and Justice Foundation, and the New Orleans Crime Coalition. Following the investigation, on March 17, 2011, the United States announced its findings that NOPD has engaged in patterns and practices of misconduct that violate the Constitution and federal law, including in the areas of excessive force; illegal stops, searches, and arrests; gender discrimination; discriminatory policing based on racial, ethnic, and LGBT bias; as well as failing to provide critical police services to language minority communities. The Report of Findings discussed also the critical importance of the OIPM. The Report noted that the OIPM came about as a result of the work of “well-regarded and prominent community advocates as well as NOPD representatives,” who considered the type of civilian oversight that would be best for New Orleans, and that we had “met with the [OIPM] several times and have been impressed with her dedication to building genuine reform and a construction relationship with NOPD and the community.” Report at 113. We noted also that “deference should be given to the oversight mechanisms a community has chosen for itself,” and

that “regardless of the type of oversight chosen, it is critical that oversight mechanisms be sufficiently resourced and empowered.” We went on to express our “concern regarding whether the [OIPM] has sufficient resources to carry out its duties and it remains to be seen whether it will be given sufficient latitude in practice to be effective.” Report at 114. The same day the Report was issued, the United States met directly with line officers and commanders to discuss the findings. In the ensuing days, the United States continued to meet with community groups and other stakeholders regarding the Report and about ideas for remedies to be included in the Decree.

Subsequent to issuance of the Report of Findings, the United States and the City engaged in nine months of negotiations in an attempt to reach a settlement that was adequate to remediate the pattern or practice of unconstitutional behavior by NOPD; fair to all those who may be affected by the Decree; and that could reasonably be implemented. During the course of drafting and negotiating this Decree, the Parties again consulted with subject matter experts, as well as various persons and organizations who would be affected by the Decree, including police commanders, supervisors, and line officers; union leaders; the OIPM, a broad spectrum of advocacy groups, criminal justice organizations, and related community stakeholders to ensure that their concerns were heard and considered. The four entities now seeking intervention were each repeatedly consulted both prior to the issuance of the findings and before the filing of the Complaint and Decree and many of their specific proposals are addressed in the Decree.

On July 24, 2012, the United States filed a Complaint alleging the unconstitutional behavior it had reported in its findings, along with a Decree between the United States and the City intended to resolve the United States’ claims, and a Joint Motion of the Parties asking the Court to enter the Decree as an Order of the Court.

The Decree requires changes in policies and practices designed to ensure that NOPD performs its duties in a constitutional manner. It also provides for an unprecedented level of input by the entire New Orleans community, to ensure that the required reforms are effective and sustained. The Decree requires NOPD to fully implement community oriented, problem-solving policing. NOPD must prepare a publicly available report on at least a quarterly basis detailing its community policing efforts. NOPD must form community partnerships, and must annually measure and assess the strength of those partnerships. It must engage with the community in providing training, and must meet regularly with the community of each District it serves. NOPD must also conduct regular surveys of members of the New Orleans community, including its officers, regarding their experiences with and perceptions of NOPD and public safety. To ensure sustainability beyond the life of the Decree, the Decree includes measures for transparency and oversight, which allow the community to participate in open meeting to address areas of community concern. It also includes provisions requiring a Police Community Advisory Board, which will further facilitate regular communication and cooperation between NOPD and community leaders.

The Decree also requires NOPD to provide substantially more assistance to officers in dealing with the stressors of their difficult work—something no police consent decree has required in the past, and a direct response to concerns expressed by officers. The Decree further requires significantly more training for officers, something that officer surveys and the United States’ own conversations with officers have confirmed is high on officers’ lists of priorities. As set out further below, the Decree’s provisions regarding the OIPM reflect unprecedented support for civilian oversight.

Under the terms of the Decree, the City and NOPD will endeavor to reach full and effective compliance with the Decree within four years of its effective date. Decree, ¶ 491. However, it could take longer because the Decree will not terminate until the Court determines that the City has been in full and effective compliance for two years. *Id.*

The Court held a status conference days after the documents were filed and, on July 31, 2012, issued an Order inviting all interested parties to submit written comments on the Decree; setting a time frame for parties wishing to intervene to so move; and scheduling a hearing for August 29, 2012, after which the Court will determine whether the Decree is fair, adequate, and reasonable, and should be entered by the Court accordingly.

Following the issuance of that Order, four entities separately have sought intervention: Crescent City Lodge No. 2, Fraternal Order of Police, Incorporated (“FOP”)<sup>1</sup>, an organization that represents almost 90 percent of NOPD officers but that does not have a collective bargaining agreement with the City; Police Association of New Orleans, Inc. (“PANO”), an organization of NOPD officers that does not have a collective bargaining agreement with the City<sup>2</sup>; Community United For Change (“CUC”), a community organization that advocates for reform of NOPD; and the OIPM<sup>3</sup>, a division within the City’s Office of Inspector General, which is tasked with

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<sup>1</sup> Walter Powers, Jr., an NOPD sergeant, seeks intervention along with FOP, individually and as president of FOP. Because Sergeant Powers’ interests do not differ from those of FOP, for the purposes of this Opposition, our references to FOP include Sergeant Powers.

<sup>2</sup> Michael Glasser, an NOPD officer, seeks intervention along with PANO, individually and as president of PANO. Because Officer Glasser’s interests do not differ from those of PANO, for the purposes of this Opposition, our references to PANO include Officer Glasser.

<sup>3</sup> Susan Hutson seeks intervention along with the OIPM, individually and in her official capacity as the Independent Police Monitor. Because Ms. Hutson’s interests do not differ from those of the OIPM, for the purposes of this Opposition, our references to the OIPM include Ms. Hutson.



monitoring NOPD, particularly in the areas of civilian and internally-generated complaints, internal investigations, discipline, use of force, and in-custody deaths.<sup>4</sup> Movants do not seek intervention to challenge the allegations in the United States Complaint and, to a remarkable extent, express no disagreement with the specific requirements of the Decree. Rather, some Movants make generalized claims that the Decree will not reform NOPD, while others express concern that the Decree generally does not properly prioritize their interests.

### III. DISCUSSION

#### A. Intervention as of Right

Where motions for intervention are timely, as they are here, a Court should grant intervention as of right under Rule 24(a) only where the Movant has a “direct, substantial, and legally protectable interest” in the subject matter of the litigation; the denial of intervention would significantly impair or impede Movant’s ability to protect this interests; and Movant’s protectable interests are not adequately represented by the existing parties. *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc). Each of these requirements must be met to intervene as of right. *Haspel & Davis Milling & Planting Co. Ltd. V. Board of Levee Commissioners of New Orleans*, 493 F.3d 570, 577-78 (5th Cir. 2007). The interest must be more than a mere economic interest. *Ross v. Marshall*, 426 F.3d 745, 757 (5th Cir. 2005). It must be “one which the *substantive law* recognizes as belonging to or being owned by the applicant.” *New Orleans Pub. Serv., Inc.*, 732 F.2d at 464 (emphasis in original). Impact on employment is insufficient without more to warrant intervention as of right. *See, e.g., Stallworth*

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<sup>4</sup> NOPD’s Black Organization of Police, a third police fraternal organization, did not move to intervene.

*v. Mansanto Co.*, 558 F.2d 257, 269-70 (5th Cir. 1977) (where no collective bargaining agreement existed, employees lacked a protectable interest warranting intervention into employment-related consent decree).

None of the Movants have articulated any legally protected property interest that will be impaired if they are not permitted to intervene. Rather, Movants argue that they should have had greater participation in the creation of the Decree that may be entered, and that they should be allowed to intervene to participate in its implementation. Memorandum in Support of FOP's Motion to Intervene, [ECF No. 9-2] ("FOP Memorandum") at 1; Memorandum in Support of PANO's Motion to Intervene, [ECF No. 13-1] ("PANO Memorandum") at 6; Memorandum in Support of OIPM's Motion to Intervene [ECF No. 15-1] ("OIPM Memorandum") at 1; CUC Motion to Intervene [ECF No. 11] at 3. However, no Movant asserts that it had any cognizable right to participate directly in negotiations, and there is no case law of which we are aware that would support such an assertion in this context. Nor does any Movant explain why participation in the implementation in the Decree requires intervention, or what right would be impaired during implementation if the Movant is not allowed to intervene. It is critical that Movant's be heard on whether they believe the Decree is fair, adequate, and reasonable, but such a hearing does not require their intervention.

The only protectable interest that the FOP and PANO assert is the officers' property interest in their jobs, which stems from their status as classified civil servants. However, the Decree does not in any way affect officers' right to employment, nor does either organization assert any way in which it does. Moreover, because the organizations' members do not have collective bargaining agreements with the City, they have no contractual rights with which the Decree may interfere. The FOP and PANO also seem to assert that its members are bound by

the Decree's terms and therefore have an interest that may be impaired. FOP Memorandum at 9; PANO Memorandum at 6-7. But, NOPD is permitted to unilaterally issue, and their members are required to follow, NOPD policies and procedures that are issued and implemented in compliance with civil services rules, regardless of the Decree. Because the Decree does not restrict the FOP or PANO any more than civil service rules permit, it does not disturb a legally recognizable right. *Cf. United States v. Int'l Bhd. of Teamsters*, 905 F.2d 610, 622-623; (2nd Cir 1990) (affirming rejection of a nonparty union member's challenge to disciplinary procedures promulgated pursuant to a consent decree where the procedures complied with governing union constitution.). Similarly, while the Decree does enjoin officers (as employees of the Defendant) from violating others' legal rights, officers are bound by this requirement regardless of the Decree.

*United States v. Los Angeles*, 288 F.3d 391, the case involving the consent decree to reform the Los Angeles Police Department ("LAPD"), is distinct because in that case the Court found that the LAPD officers' union had a protectable interest in the remedy sought by the parties because the union and the city operated pursuant to a memorandum of understanding ("MOU") which governed the terms and conditions under which members of the union were employed by the city. The union was claiming an interest in the remedy based on its assertion that the consent decree was incompatible with the MOU. In finding the officers' union had a protectable interest in the consent decree, the Court said,

The Police League's interest in the consent decree is two-fold. To the extent that it contains or might contain provisions that contradict terms of the officers' MOU, the Police League has an interest. Further, to the extent that it is disputed whether or not the consent decree conflicts with the MOU, the Police League has the right to present its views on the subject to the district court and have them fully considered in conjunction

with the district court's decision to approve the consent decree. *United States v. Los Angeles*, 288 F.3d at 400.

FOP and PANO argue that the City's civil service protections provide a legal interest akin to the MOU in LAPD. However, FOP and PANO have not cited any provision of the Decree that may interfere with any right afforded them by virtue of their status as classified civil servants. They have not claimed that the Decree is incompatible or inconsistent with any employment property interest or legal entitlement created by civil service rules or otherwise. Nor can they, because when requiring necessary corrective action that may implicate civil service rules, the Decree explicitly states that it shall be in accordance with those rules. Decree, [ECF No, 2-1], ¶¶ 91, 425. In implementing any provisions that may implicate civil service rules, the Decree requires NOPD to work with Civil Service to ensure the two are not in conflict. *Id.*, ¶¶ 295, 296, 302, 303, 304, and 305.

This case is thus materially distinct from *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996). There, various officer organizations sought intervention in a Title VII employment discrimination suit to challenge a proposed consent decree. The consent decree at issue was intended to remedy racial discrimination in promotions by guaranteeing a certain number of promotions to specified minority groups. Officers who were not members of those minority groups sought intervention, claiming that the proposed decree denied them opportunities for promotion solely on account of race. The Court held that their interests in having equal access to a promotion system and promotion opportunities without reference to race, color, or national origin entitled them to intervene. *Edwards*, 78 F.3d 983, 1004. No similar potential deprivations of rights exist here and neither FOP nor PANO articulate any way in which the Consent Decree may interfere with the entitlement to their jobs.

The OIPM similarly does not articulate any legally protectable interest that may be at stake, or any impairment of such an interest that might be caused by denying intervention. The United States fully supports the mission of the OIPM and, more generally, civilian oversight of law enforcement agencies. Indeed, had the OIPM not already been in existence in New Orleans, the United States would likely have insisted during negotiations that it or a similar form of independent civilian oversight be created, because long term civilian oversight plays a critical and quite different role from a consent decree monitor in ensuring constitutional policing. The mission of the OIPM “to ensure [NOPD’s] accountability, transparency, and responsiveness to the community it services,” OIPM Memorandum at 2, is completely consistent with the purpose of the Decree.<sup>5</sup> The aligned interests between the OIPM and the Decree, however, do not create within the OIPM a direct, substantial, and legally protectable interest in the proceedings, as required by the Rule 24 (a)(2) to support intervention as a matter of right. *Edwards*, 78 F.3d at 1004.

The OIPM expresses concern that the Decree creates a “two tier” system with both the Consent Decree Monitor and the OIPM performing the same functions, to the detriment of the OIPM. OIPM Memorandum at 6, 9-10. The role of the OIPM and the Consent Decree Monitor are complementary but appropriately quite distinct. The Consent Decree Monitor will have the responsibility of carrying out intensive and focused review of whether and how the requirements of the Decree are implemented and of conducting specific outcome assessments. Its role will be

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<sup>5</sup> See Consent Decree [ECF No. No. 2-1], at 6, 105-108, 116 (“The Parties have a shared recognition that the ability of a police department to protect the community it serves is only as strong as the relationship it has with that community. Public safety, constitutional policing, and the community's trust in its police force are thus interdependent. The full and sustained implementation of this Agreement is intended to protect the constitutional rights of all members of the community, improve the safety and security of the people of New Orleans, and increase public confidence in the New Orleans Police Department”).

acute and relatively short term. The OIPM is meant to provide ongoing oversight that will outlast the Decree and help ensure that constitutional policing is sustained long after the term of the Decree has ended and the Consent Decree Monitor has ceased monitoring. Both roles are critical to constitutional policing and indeed, most of the police settlement agreements in which the United States has been part, have involved both a consent decree monitor as well as some form of civilian oversight.<sup>6</sup>

The OIPM asserts also that the Decree abrogates its authority and regulates “everything the OIPM is required to do.” OIPM Memorandum at 6. In fact, the Decree is explicit that it “in no way diminishes the authority and oversight provided by the [OIPM] pursuant to city ordinance and the related Memorandum of understanding between the [OIPM] and NOPD.” Decree, ¶ 440. The OIPM also alleges that the Decree makes its functions impossible to perform, OIPM Memorandum at 6, but the OIPM does not articulate any specific way in which the Decree will prevent it from fulfilling its duties.

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<sup>6</sup> Simultaneous monitoring and civilian oversight by different entities with different roles and tasks, is common, as indicated by Mr. Eure’s affidavit attached to the OIPM Motion. In Pittsburgh, the Citizen Police Review Board has been in existence since 1997, the same year the police consent decree there was signed and a consent decree monitor was put in place. In the City of Los Angeles, a Board of Police Commissioners is made up of five civilian members and was in existence before, during and after the Los Angeles Police Department’s consent decree monitoring term. The County of Los Angeles has both an Office of Independent Review and Special Counsel for Los Angeles County, both of which have been in place even while an MOA between the U.S. Department of Justice and the County had been monitored by others. Cincinnati’s Citizen Complaint Authority was created by the Collaborative Agreement that was part of the resolution of the United States’ investigation of the Cincinnati Police Department and has remained in existence after that consent decree monitor ended its tenure. Oakland’s Citizens’ Police Review Board has been in existence before and throughout the term of a federal consent decree (in which the United States is not a party) regarding the Oakland Police Department that has been monitored by a separate monitoring team. These and other systems of simultaneous, focused consent decree monitoring, alongside more institutionalized civilian oversight, underscore the separate roles of such “two tier” systems of oversight.

While, as noted in the Parties' Joint Motion [ECF No. 2], the Decree is a hard-fought compromise in which neither side was able to obtain every provision it would have liked, this Decree arguably is more protective of civilian oversight than any previous police consent decree. While the OIPM asserts that fewer than fifteen paragraphs of the Decree reference the OIPM, it should be noted that the Decree incorporates by reference the entire 25-page Memorandum of Understanding ("MOU") negotiated by the OIPM with NOPD, giving the OIPM's own MOU the force of the Decree. Decree, ¶ 442. The Decree requires NOPD and the City to provide the OIPM ready and timely access to the information necessary to fulfill its duties, *id.* at 440, a concern repeatedly expressed by the OIPM throughout the course of this investigation and negotiation.

The Decree thus does not restrict, abrogate, or otherwise diminish the role of the OIPM. The Decree and the OIPM's shared interests and separate roles can and should be used to bolster and make more efficient and effective each others' efforts to bring about and sustain constitutional policing within NOPD. Indeed, this is what is intended by the provisions within the Decree requiring the Monitor and the OIPM to work together where possible.

The OIPM is correct that the Decree did not expand its role beyond what is set out by ordinance. We recognize that the OIPM is disappointed about this. Indeed, the United States has encouraged and will continue to encourage the City, the City Council and the community to increase the authority of the OIPM so that the Consent Decree Monitor's duties can be transitioned to the OIPM to ensure that gains made under the Decree are sustained, and that a strong and informed voice of independent police oversight remains. This will require both greater authority and increased resources. In our view, this investment is warranted because the OIPM is uniquely positioned to ensure the sustainability of the Decree's reforms and carries the

intrinsic value of long term, independent, civilian oversight. Notwithstanding the important role of the OIPM in bringing about and sustaining constitutional policing, intervention into this case is neither necessary to ensure that the OIPM remains effective, nor legally required.

CUC is a community organization that advocates for reform of NOPD. Its motion and accompanying filings also do not articulate an interest that the substantive law recognizes as belonging to or being owned by CUC that would be impaired by the Decree. It offers criticism of the Decree, alleging that it will not address the fundamental problems of NOPD.

Memorandum in Support of CUC Motion to Intervene [ECF No. 11-1] at 4. Its criticism that the Decree will not adequately remediate the United States' allegations does not demonstrate a substantial, legally protectable interest warranting intervention. The United States recognizes CUC's effort and focus on reforming NOPD, and met frequently with CUC throughout the investigation and negotiation of this matter. However, CUC's efforts do not create a right to intervene in this case.

Moreover, this litigation does not prevent any individual from initiating suit against NOPD officers who engage in unconstitutional practices. Where a potential intervener remains free to pursue all of the independent claims he or she may have, any interest the potential intervener holds is not impaired for the purposes of Rule 24(a). See *Shea v. Angulo*, 19 F.3d 343, 347 (7th Cir. 1994) (holding that where applicant in intervention remained free to protect his rights by initiating his own suit, "there is no potential impairment" of those rights); accord *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979); *SEC v. Everest Mgmt.*, 475 F.2d 1236, 1239 (2d Cir. 1972). Nor does any aspect of this litigation prevent CUC from continuing to work on police reform.



What interests Movants do have already are represented by the existing parties. The burden of establishing inadequate representation is on the potential intervenor. *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994), citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972). It is sufficient that a party moving for intervention demonstrate that representation may be inadequate. *Edwards*, 78 F.3d at 1005 citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972). While the movants' burden is minimal, "it cannot be treated as so minimal as to write the requirement completely out of the rule." *Cajun Electric Power Coop.*, 940 F.2d 117, 120 (5th Cir. 1991) (rejecting regulatory agency's argument that the parties will not present adequate information to the court and concluding that movant would bring no unique arguments to the litigation), citing *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir.1984)

The Fifth Circuit has recognized two presumptions regarding adequate representation. *Edwards*, 78 F.3d at 1005. First, in a suit involving a matter of sovereign interest, the government entity is presumed to represent the interests of all of its citizens and a much stronger showing of inadequacy is required. *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir.1994). This is true whether the would-be intervenor is a citizen or a subdivision of a governmental entity. *Edwards*, 78 F.3d at 1005. "To overcome this presumption, an applicant must show 'that its interest is in fact different from that of the [governmental entity] and that the interest will not be represented by [it].'" *Hopwood*, 21 F.3d at 605, quoting *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C.Cir.1979). Where the governmental entity appears in its capacity as an employer and not in its capacity as a sovereign, however, the presumption of adequate representation is inapplicable. *Id. at 1005*. This presumption of adequate representation applies, therefore, to CUC and to the OIPM, and to NOPD officers in their

capacities as individuals interested in constitutional policing. Because the City appears as the employer of the FOP's and PANO's members, the presumption of adequate representation does not apply to members of those organizations acting in their capacities as employees.

The second presumption of adequate representation recognized by the Fifth Circuit arises when the would-be intervenor has the same ultimate objective as a party to the lawsuit.

*Edwards*, 78 F.3d at 1005; *see Kneeland v. National Collegiate Athlete Ass'n*, 806 F.2d 1285 5th Cir. 1987) (denying movants' motion for intervention on the grounds that would-be intervenors and defendants had the same ultimate objective to prevent disclosure of documents). "In such cases, the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." *Edwards*, 78 F.3d at 1005.

None of the Movants is able to overcome this second presumption of adequate representation. All share the ultimate objective of constitutional policing. Throughout the investigation and negotiation process, the United States solicited input from officers, and a retired NOPD officer fully participated on the City's negotiation team to represent the interests of NOPD and its officers and to act as their liaison throughout the process. The members of CUC, as residents of New Orleans, are one group of constituents the United States is seeking to protect in this action. The interests of the OIPM, in ensuring that the NOPD operate in a constitutional manner, mirrors the mandate of the United States in enforcing Section 14141. The legal interests of CUC, the OIPM, and of the United States are thus in complete alignment. No Movant has alleged adversity of interest, collusion, or nonfeasance by the existing parties. The interests of the Movants are thus presumptively adequate pursuant to an "ultimate objective" analysis.

**B. Permissive Intervention**

Where, as here, there is no right to intervene, the Court may, in its discretion, nevertheless grant permission to intervene to a person who “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). A court, in exercising its discretion, “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

Permissive intervention “is wholly discretionary with the [district] court ... even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied.” *New Orleans Public Service, Inc.*, 732 F.2d at 470-71 (quoting 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1913, at 376-77 (2d ed. 1986)). In acting on a request for permissive intervention, the district court may consider, among other factors, whether the intervenors’ interests are adequately represented by other parties, *id.* at 472, and whether intervention will unduly delay the proceedings or prejudice existing parties, Fed.R.Civ.P. 24(b). In addition, it is proper to consider whether movants will “significantly contribute to full development of the underlying factual issues in the suit.” *New Orleans Public Services Inc.*, 732 F.2d at 472.

Each of the four Movants’ arguments can be distilled to an objection that their particular interests should have been given higher priority and better reflected in the Decree. Nowhere in the Movants’ four Motions do they say what they would actually *do* if allowed to intervene, except seek modification of the Decree as they deem appropriate. This is neither an appropriate nor prudent justification for permissive intervention. If allowed to intervene Movants would presumably seek to delay implementation of the Decree until it is rewritten to include different provisions more aligned with their particular interests. If this were permitted, Movants’

intervention would prejudice the existing Parties, and be unfair to the hundreds of thousands of other New Orleans residents who have an equal interest in ensuring constitutional policing in New Orleans, but who were not granted intervener status. It would also delay the entry and implementation of the Decree.

While Movants seek intervention to ensure that their interests are prioritized, the United States is tasked with representing the interests of all New Orleans residents who may be impacted by unconstitutional policing. *United States v. City of Miami*, 614 F.2d 1322, 1332 (5th Cir. 1980), *aff'd in part, vacated and remanded in part on reh'g*, 664 F.2d 435 (noting that any tendency to seek affirmative relief that goes too far in a Title VII case is likely to be constrained when the Justice Department represents the plaintiff, because it represents the interests of all citizens). Those myriad interests at times conflict with one another. During the course of its investigation, and while drafting and negotiating the Decree, the United States at times had to compromise to reach an agreement that is fair and will effectively serve interests of all in constitutional policing. Throughout, the United States engaged with every interested stakeholder to ensure that all those interests were heard, considered, and appropriately balanced. Each of the Movants' interests in particular were heard, and many are in fact reflected in the Decree.

As this Court's Order requiring the August 29 hearing has demonstrated already, there are many mechanisms to ensure that the interests of all individuals and entities, including Movants, can be fully heard, while avoiding the unfairness and delay that would result from granting intervener status. The Court has invited all interested parties to submit written comments to the Court regarding the fairness, adequacy, and reasonableness of the Decree. Movants' concerns can be fully registered by submitting written comments, without any need to intervene. Similarly, the process by which a monitor is chosen to oversee the Decree will

include a public component beyond that of any previous United States police consent decree. Anyone who has an interest in ensuring that NOPD is adequately held accountable will be invited to observe and comment on the process of choosing the individuals who will be responsible for monitoring and reporting on NOPD's progress. The Court also could invite Movants, or others, to participate in the case as *amicus curiae*, as the United States proposes. This would ensure that the Court heard, understood, and considered Movants' claims, but would not interfere with timely implementation of the Decree.

Similarly, the Decree, to an unprecedented extent, includes provisions to ensure an ongoing public voice in policing and the implementation of the Decree. These provisions make intervention, and its potential unintended consequences, unnecessary to ensure that Movants' interests are adequately addressed. The Decree requires extensive data collection and public reporting, which, when implemented, will change NOPD's culture from being reflexively secretive to reflexively transparent, putting information in the hands of officers and community groups alike to understand and, where appropriate, challenge NOPD practices or the Decree. *See, e.g.*, Decree, ¶ 427-29. The Decree requires implementation of a Community Outreach and Public Information program in each NOPD District, including regular meetings in which high-ranking NOPD officials must not only inform the public about NOPD's progress towards meeting the Decree's requirements, but also "address areas of community concern related to public trust and constitutional policing." Decree, ¶ 432-33. The Decree includes an entire section on Community Engagement which requires, among other things, that NOPD engage in problem solving activities that are focused on "the community's priorities." Decree, ¶224. This section also requires a biennial community survey, which surveys police officers as well as members of the broader NOPD community regarding their perceptions of NOPD and public

safety in New Orleans. Decree, ¶230-33.

The interests of Movants were fully considered by the Parties during the negotiation of the Decree, and the Court and Decree provide full opportunity for ongoing consideration of these and any other interests. Granting intervention to Movants would delay and make more cumbersome implementation of the Decree, and disadvantage the hundreds of thousands of individuals with an equal interest in the swift, effective, and lasting implementation of constitutional policing in New Orleans.

#### **IV. CONCLUSION**

For the foregoing reasons, the United States respectfully requests that this Court deny the Movants' motions for intervention and instead grant Movants *amicus* status for the purposes of the August 29 hearing to ensure the Court can fully consider Movants' concerns regarding the negotiation and terms of the Decree.

Respectfully submitted this 14th day of August, 2012

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